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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949

No. 243

ALTHEA I. CUNNINGHAM,
Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE SUPREME COURT:

Althea I. Cunningham prays that a writ of certiorari be issued by this court to review the decree and opinion of the Appellate Court of Illinois, First District, rendered January 24, 1949, affirming a decree against your petitioner entered by the Circuit Court of Cook County, Illinois, dismissing her amended complaint in chancery which was filed April 15, 1948. (See pages 6-10 below)

Petitioner sought relief by petition for leave to appeal to the Supreme Court of the State of Illinois and that peti-

tion was denied by order of May 12, 1949. (Rec. ....) Petitioner has exhausted all judicial remedy before the courts of Illinois.

The Circuit Court and the Supreme Court filed no opinions. The opinion by the Appellate Court of Illinois, First District, is in the record at page ..... That is the highest court of Illinois which would pass upon this record.

There has never been any trial by evidence in this record. By arbitrary rulings the Illinois courts have prevented any discovery or accounting of the trust fund in chancery.

ORDER OF CIRCUIT COURT.

This order is a mere dismissal as follows:

> "It Is Therefore Ordered that the complaint as amended and all counts thereof be and the same is hereby stricken, and the suit dismissed at plaintiff's costs." (Rec. 32)

No findings whatever were made.

In the Appellate and Supreme Courts of Illinois, the City of Chicago stated its defense as follows:

> "The claim of petitioner is solely for interest and therefore barred by the statute of limitations because suit was not started within five years after payment of the principal of the judgment."

ACTION BY APPELLATE COURT.

The opinion on review (Rec. ....) as to claim in chancery merely says "plaintiff's theory of a trust as set forth in their briefs is without merit." As stated above, the Circuit Court and the Supreme Court of Illinois gave no opinion.

DECREE AND OPINION FOR REVIEW.

The Illinois courts have disregarded the amended complaint in chancery filed by petitioner in the Circuit Court of Cook County in this case by leave of court on April 15, 1948, (Rec. 13) and have denied to your petitioner any hearing whatever upon the substance and merits of that complaint in chancery. Thereby the Illinois courts have denied any hearing upon substantial vested rights of your petitioner in equity, and have held adversely to your petitioner upon Federal questions based upon the constitution of the United States and hereinafter more fully set forth.

STATEMENT OF THE CASE.

This is an action to recover the unpaid interest on a judgment entered under section 42a of the Local Improvement act of Illinois (Ill. Rev. Stats. Ch. 24, par. 84-42a) awarding compensation for real estate of petitioner, taken in a combined improvement for the widening and improvement of a north and south street known as Garland Court (and for the improvement of East Haddock Place) in the block bounded by East South Water Street, North Michigan Avenue, East Lake Street and North Wabash Avenue in the City of Chicago.

The unpaid interest is part of the just compensation which is guaranteed by the Constitution. See below pages 14, 42 and 43.

On June 21, 1922, the City Council passed the ordinance for the combined improvement (Abst. 13, Rec. 23). Only two lots were condemned, being lots Nine (9) and Twenty-three (23) in Fort Dearborn Addition to Chicago.

Appellant was the owner of Lot Nine (9), and one Ada S. Garrett owned lot Twenty-three (23).

On November 28, 1922, the City of Chicago filed its petition in the County Court of Cook County, Illinois, in case

No. 49014 entitled "*City of Chicago* v. *Althea I. Cunningham,*" in conformity to the terms and provisions of said ordinance.

On September 29, 1924, the commissioners' report and assessment roll was filed in said cause; and as finally approved by the court, the total cost of the widening and improvement was fixed at $444,360, of which $384,000 was the total value of private property to be taken for the improvement; $49,180 was the cost of the improvement (omitting land to be acquired) as estimated by the engineer, and $11,180 was the estimated cost of making, levying and collecting the assessment and the lawful expenses attending the making of said improvement (Abst. 15, Rec. 23).

On June 9, 1926, final judgment was entered by the County Court in said case No. 49014 confirming the Commissioners' report and assessment roll as recast, and awarding the sum of $164,000 for the taking of said lot Nine (9). All of lots 9 and 23 was taken, leaving no remainders subject to assessment (Abst. 15, Rec. 23). There was no assessment against your petitioner.

On August 17, 1926, the special assessment to finance the improvement was certified for collection to the city collector and Warrant No. 51492 was thereupon issued and delivered to him by the clerk of the County Court, as more fully appears from the record of said warrant contained in Volume "Condemnation 10" at pages 406 to 427 of the records of said city collector (Abst. 16, Rec. 23).

On July 31, 1927, the warrant was returned to the county treasurer as to delinquent properties. All assessments collected by the city collector and the county treasurer, respectively, were paid and transferred by them to the treasurer of the City of Chicago (Abst. 16, Rec. 23).

On September 10, 1927, the City of Chicago paid to appellant, as the owner of said Lot Nine (9), the sum of

$41,000 on account of the award of $164,000 and on December 22, 1927, the city paid to her the further sum of $123,000, being the balance of the amount of said award of $164,000, but did not then or thereafter pay to appellant or to anyone in her behalf any of the interest which accrued on said award from and after June 9, 1926 (Abst. 16, Rec. 23), which is the date of judgment, and taking of the land.

Interest at five per cent per annum on said judgment of $164,000 from June 9, 1926, to September 10, 1927, the date of said first payment on account of the award, is the sum of $10,659.99 and interest on the balance of the award from September 10, 1927, to December 22, 1927, the date of the last payment on account thereof is the sum of $1,341.82, making a total of $12,001.81, for interest due and unpaid on said award on December 22, 1927.

In and by said final judgment $220,000 was awarded to the owner of said lot Twenty-three (23) and said award was paid by the city to Ada S. Garrett or to the conservators of her estate. In addition thereto the City of Chicago paid to her or her estate, interest on said award in the total amount of $8,284.88, of which $3,781.25 was paid on or about July 27, 1927, and $3,703.63 on or about September 7, 1927, and the further amount of $800 on or about April 13, 1942; all as more fully appears from the records of the comptroller of the City of Chicago and of the Board of Local Improvements (Abst. 17, Rec. 23).

Appellant's original complaint at law for unpaid interest was filed September 28, 1933 (Abst. 1, Rec. 3). On October 17, 1933, the City of Chicago filed its demurrer (Abst. 11, Rec. 14). No hearing was had upon that demurrer.

On April 15, 1948, by leave of court, appellant filed an amendment to the complaint containing a separate count in chancery (Abst. 13, Rec. 23). On April 26, 1948, appellee filed its motion to dismiss (Abst. 22, Rec. 34).

On April 29, 1948, an order was entered striking the complaint as amended and all counts thereof and dismissing the cause (Abst. 32, Rec. 43). See page 2 above.

RELIEF SOUGHT BY APPEAL.

On May 21, 1948, notice of appeal was filed. Appellant prays that (1) the judgment may be reversed or that (2) the judgment may be reversed and judgment entered in her favor and against defendant for the sum of $12,001.81, or that (3) the amount due and owing to plaintiff may be determined by the court and a decree and judgment entered against the defendant requiring it to pay such judgment or that (4) such other judgment be entered as to the court shall seem meet (Abst. 33, Rec. 45).

FACTS STATED BY THE COMPLAINT IN CHANCERY.

(Rec. 13 to 21).

"The ordinance of the City Council of Chicago provided for a condemnation and special assessment double improvement and the judgment therein awarding the sum of $164,000 to your petitioner as then value of her real estate to be taken for the improvement by final judgment June 9, 1926.

"On August 17, 1926, the special assessment levied for the payment of said local improvement was certified for collection to the city clerk of the City of Chicago and Warrant No. 51492 was thereupon issued and delivered to the city collector by the clerk of said County Court as more fully appears from the record of said warrant contained in Volume "Condemnation 10" at pages 406 to 427 of the records of said city collector. On July 31, 1927, said warrant was returned to the county treasurer for the collection of all delinquencies in the payment of said assessment. All amounts of principal and interest collected by the city collector

and the county treasurer, respectively, were paid and transferred by them to the treasurer of the City of Chicago.

"On September 10, 1927, the City of Chicago paid to the plaintiff, Althea I. Cunningham, as the owner of said lot nine (9) the sum of $41,000 on account of the award of $164,000 to be paid to the owner or owners of and parties interested in said lot, and on December 22, 1927, the City of Chicago paid to plaintiff the further sum of $123,000, being the balance of the amount of said award of $164,000, but did not pay to plaintiff or to any one in her behalf any interest accrued on said award from and after June 9, 1926, the date of entry of said final judgment in condemnation.

"Interest at five per cent (5%) per annum on said judgment debt of $164,000 from June 9, 1926, the date of entry of said final condemnation judgment, to September 27, 1927, the date of said first payment on account of the debt, is the sum of $10,659.99, and interest on the balance of the principal amount of said debt from September 27, 1927, to December 22, 1927, the date of the last payment on account thereof, is the sum of $1,341.82, or a total amount of $12,001.81 interest due and unpaid on said award.

"In and by said final judgment entered June 9, 1926, the amount of $220,000 was awarded to the owner or owners of and parties interested in said lot twenty-three (23) in block seven (7) in Fort Dearborn Addition, all of which was likewise condemned and taken for said improvement; that said amount of $220,000 was fully paid by the City of Chicago to one Ada S. Garrett as the owner of said lot twenty-three (23) or to the conservators of her estate, and in addition thereto the City of Chicago paid to her or to the conservators of her estate interest on said award in the total amount of $8,284.88 of which $3,781.25 was paid on or about July 27, 1927, and the amount of $3,703.63 was paid on or about September 7, 1927, and the amount of $800 was paid on or about April 13, 1942, all as more fully appears from the records of the comptroller of the City of Chicago and of said Board of Local Improvements."

Charging Part of Complaint in Chancery

Upon that foundation and recital of prior record fact, the count in chancery then continues by charging and asserting against the City of Chicago as follows:

"Under section 42a of the Local Improvement act as amended and in force on June 9, 1926, the special assessment levied for said improvement became a trust fund for the payment of just compensation for property to be taken. The plaintiff is a beneficiary of said trust fund and the City of Chicago is an express trustee to collect and distribute such fund to the parties entitled thereto. As such trustee the city has neither repudiated the trust nor brought any repudiation thereof to the notice of plaintiff as such beneficiary, and plaintiff is entitled to recover the trust fund or so much thereof as may be necessary to constitute just compensation for the property of plaintiff taken for said improvement. Plaintiff was the owner of and the only party interested in said Lot nine (9) and was and is entitled to receive all of the compensation for the taking of said property. Neither the statute of limitations nor laches has run against the plaintiff as a beneficiary of said trust fund.

"Plaintiff has a vested right in the special assessment levied and collected under section 42a for payment of the award and interest thereon where payment is delayed, and neither the statute of limitations nor laches can divest her of such right.

"Under section 32 of the Local Improvement act the liability of the City of Chicago for payment of just compensation is absolute and the plaintiff's right to such payment is a vested right which cannot be divested by the statute of limitations nor by laches.

"Section 13 of article 2 of the Constitution of Illinois provides that private property shall not be taken for public use without just compensation and the said section creates and establishes a constitutional lien in favor of the owner of property condemned for the amount of just compensation awarded therefor.

"The City of Chicago as petitioner in said condemnation proceeding elected to enter the final judgment provided in section 32 of the Local Improvement act as amended and thereby became bound and liable to pay

just compensation for said property whether the special assessment be collected or not and such judgment of condemnation was not conditional. The entry of final judgment under section 32 created and established a lien in favor of plaintiff upon the general funds of the City of Chicago and upon the special assessment levied and collected for said improvement.

"The entry of final judgment under section 42a of the Local Improvement act has created and established a lien in favor of plaintiff upon the general funds of the City of Chicago and upon the special assessment levied and collected for said improvement under said section 42a.

"That the general corporate fund of the City of Chicago is impressed with a trust for the payment of the just compensation due plaintiff and it is the duty of the City of Chicago as such express trustee to pay just compensation for the property of plaintiff either out of said special assessment so confirmed and collected or out of its general funds, both of which are impressed with an express trust for the payment of said just compensation. The duty to pay just compensation is by the constitution made a continuing one until it is fully discharged and satisfied.

"That the City of Chicago as such trustee has assembled and holds ample funds available for the payment of just compensation to plaintiff herein and for the satisfaction of the final judgment, and interest thereon, entered under said Local Improvement act.

Prayer of Complaint in Chancery

"WHEREFORE, your petitioner prays:

(a) That the City of Chicago, defendant herein, may be required to answer under oath this additional count as a separate complaint in chancery.

(b) That the City of Chicago be ordered to discover and account to plaintiff for all moneys applicable to the payment and satisfaction of the just compensation due plaintiff.

(c) That general relief and incidental remedies be granted to plaintiff."

Court Record Admission of Trust Res.

Attached to the complaint in chancery and made a part of it as Exhibit "A" is the money recapitulation prepared by the court commissioners, for the condemnation special assessment proceeding general number 49014, County Court of Cook County. One item thereof is the assessment against the City of Chicago which reads as follows: (Rec. 21)

> "Proportion of the total cost of said improvement (including estimate of value and damages, and the estimate of the cost of such proceeding), which will be of benefit to the public and assessed to the City of Chicago..... $228,766.38"

By entry of the condemnation-special assessment joint judgment the City of Chicago made itself on that date, June 9, 1926, trustee of that sum as part of the trust fund. Later it collected the balance of the trust fund and became possessed of the whole fund provided for by the judgment in the local improvement case.

DEFENSE BY CITY OF CHICAGO.

The only defense made to the complaint and count in chancery is a motion to dismiss (Rec. 22) supported by affidavit (Rec. 24) and exhibits (Rec. 26-31). The exhibits show that the amount of the original award to your petitioner was paid to her by checks drawn against warrant No. 51492 which is the special assessment trust fund established by Warrant No. 51492. By making these exhibits a part of the affidavit of the City of Chicago the existence of the trust fund is fully established and the payment thereout of original award money to your petitioner, is thereby admitted under oath by the defendant City of Chicago. That is admission by the trustee, City of Chicago, that petitioner as beneficiary of the trust fund should have in equity a discovery and accounting for that trust fund.

The only defense stated on review by the City of Chicago, was to claim there is an applicable statute of limitations. (Above page 2)

PLAINTIFF'S THEORY OF THE CASE AS STATED BY PETITIONER TO THE ILLINOIS COURTS.

"In a combined proceeding under section 42a of the Local Improvement act the special assessment levied for the improvement is a trust fund for the payment of just compensation for property taken.

"The owner of land taken or damaged is a beneficiary of the fund and the city is an express trustee to collect and distribute the fund.

"The city has not repudiated the trust. Plaintiff is therefore entitled to recover the fund or so much thereof as may be necessary to constitute just compensation for her property taken for the improvement.

"Neither the statute of limitations nor laches has run against the plaintiff as beneficiary of said trust.

"Plaintiff has a vested right in the special assessment collected under section 42a for payment of the award fixed by the judgment and interest thereon where payment is delayed. Neither the statute of limitations nor laches can divest planitiff of such right.

"Under section 42a of the Local Improvement act the liability of the City of Chicago for payment of just compensation is absolute and plaintiff's right to such payment is a vested right which cannot be divested by the statute of limitations or by laches.

"The entry of final judgment under section 42a created and established a preferred lien in favor of plaintiff upon the general funds of the City of Chicago. Plaintiff is not an ordinary judgment creditor of the city.

"The entry of final judgment under section 42a of the Local Improvement act created and established a constitutional lien in favor of plaintiff upon the general funds of the City of Chicago and upon the special assessment levied and collected for said improvement under said section.

"The duty to pay just compensation is by the constitution made a continuing one until it is fully discharged and satisfied.

"The city, recognizing its duty as such trustee, paid interest on the Garrett award as late as sixteen years after the entry of the final condemnation judgment.

"The City of Chicago as such trustee has assembled and holds ample funds available for the payment of plaintiff's judgment and interest thereon."

The facts of the case appear in the pleadings, and such of said affidavits as this Court may determine to be material. No evidence was heard by the Circuit Court. All orders were entered by the motion judge. No written opinion has been filed, except that by Illinois Appellate Court.

THEORY OF PETITIONER IN THIS COURT.

Condemnation proceedings provide a means of making a contract upon the court record for the purchase of real estate from an unwilling owner. All usual principles of equity and of chancery procedure which govern in ordinary sales of real estate, apply in the liquidation of that contract. Petitioners say that the judgment order is the signing of that contract, that the prior proceedings and the constitutional provisions are the terms of the contract. The seller and purchaser of real estate are trustees for each other in contracts off the court record, from the time that the contract is signed until it has been fully performed. Petitioners say that the same is true when purchase is made by condemnation, from the time when the judgment becomes final. The condemnor as purchaser of real estate is trustee for the purchase price from the date of such judgment until payment in full with interest has been made to the property owner. *Finn* v. *Wetmore*, 212 Ill. App. 550 at 553 and 554 and cases there cited. (See pages 44-45, below.)

The Circuit Court of Cook County has "original juris-

diction of all causes in law *and equity*" (Page 29 below). *Herb* v. *Pitcairn,* 392 Ill. 138. All courts have the positive duty to pass upon federal questions under the Constitutions: Article VI, paragraph 2 of the Constitution of the United States.

Your petitioner urges that said Appellate Court by its order and Opinion, and also the Circuit Court of Cook County and the Supreme Court of Illinois by orders without any opinion, abdicated constitutional duty to your petitioner, and refused just remedy and failed to review and pass upon the constitutional and federal questions presented by this record to all said Courts of Illinois.

That in so doing said Courts arbitrarily seek to change the fundamental personal and property rights of your petitioner under the bill of rights of the Constitutions of the State of Illinois and the United States, into mere matters at the grace and permission of the Courts of Illinois. Also to change the obligatory jurisdiction of the Courts of Illinois into merely discretionary jurisdiction. Thereby your petitioner was denied an obligatory hearing as to her vested rights, her contractual rights, and equal application of law, contrary to Article VI, paragraph 2 and the fifth and fourteenth amendments to the Constitution of the United States, and contrary to due process of law. *People* v. *Kelly,* 361 Ill. 54 at 59, 60; *Cities Service Oil Company* v. *Dunlap,* 308 U. S. 208 at 212. (See page 30 below).

The Bligh Report (1 Bligh N. R. House of Lords 312 ff) and *Warner* v. *New Orleans,* 167 U. S. 467 at 477; 175 U. S. 129-132, show how complete a departure from historic chancery, has been committed in this case at bar by the opinion and ruling of the Appellate Court. That historic chancery is shown by the petition to be embedded within the Constitution of Illinois by specific language set forth by the complaint in chancery and by this petition for certiorari.

The Supreme Court of Illinois has said in *Feldman* v. *City of Chicago*, 363 Ill. 247, 249 (assumpsit upon condemnation judgment):

> "The claim here was for a sum certain, depending only upon computation. Demand for interest was made at the time the judgment was paid. The amount of compensation was fixed by the judgment and the rate of interest was fixed by the Interest Act. No dispute could arise between the city and the property owner as to the amount to be paid, after the judgment became final and unconditional."

By section 32 of the Local Improvement Act of Illinois (Chapter 24: 84-32), the duty to pay the purchase price is unconditional from and after date when the judgment becomes final. Thereafter "no dispute could arise between the City and the property owners as to the amount to be paid." Petitioner says that by said provisions of the constitution, and by Section 1 of the Eminent Domain Act (Chapter 47), and by Section 30 of said Local Improvement Act, the taking does not become lawful and sufficient until payment has been fully made. It follows that all usual remedies by mandamus and in chancery are available to the property owner, as of course until his selling price with accruing interest, as determined by the judgment order and the Constitutions has been fully paid.

FEDERAL QUESTIONS.

Whether the Illinois courts by a mere assertion "plaintiff's theory of a trust as set forth in their briefs is without merit" may deny to your petitioner a fair hearing, a financial discovery, and faithful accounting of the trust fund, which is provided for by the constitutions of Illinois and the United States, as a substitute for the land; in this case, where petitioner has shown by her amended pleading in chancery, trial court, her right thereto as a constitutional beneficiary of said trust fund. (Rec. 13 ff).

Nature of Trust Relation.

While the trust relationship between trustee beneficiary and property usually arises from an interparty contract or from a covenant to stand seized, the method is immaterial and the fact of the relationship is the important element. In the case at bar we have exactly the same relationship with the same rights and duties created by the direction of section 42a of the Local Improvement Act of Illinois followed by assembly of the trust money and the judgment in condemnation and special assessment procedure which is shown by this record. The relationship being established, the substantive law of historic chancery and the procedural law of historic chancery inevitably govern the administration and performance of the trust relationship as so created.

The courts of Illinois are informed and capable to decide correctly upon constitutional questions.

In *People* v. *Loftus*, 400 Ill. 432, it was clearly stated that the Constitution of the United States and the decisions of the United States Supreme Court are the supreme law of the land, and binding on every court in the land. And in *People* v. *Nicholson*, 401 Ill. 546 at 553, it was said that "equal protection of the law" requires that the rights of every person must be governed by the same rule of law under similar circumstances, and a mere arbitrary discrimination between different classes is a denial of the equal protection of the law.

But in the case at bar the courts of Illinois failed to see or decide the constitutional wrong done to your petitioner. The City of Chicago pays interest to Garrett out of the same trust fund eleven years after payment of principal of the same judgment which gives rise to the claim by your petitioner. In the Illinois courts the City says orally by its brief, that such payment was upon a stipulation made

with Garrett. If true, that action only multiplies the wrong. No trustee may have secret deals with some of the beneficiaries to defeat the equal rights of all beneficiaries of the same trust. But the courts of Illinois accepted that tortious explanation.

THE MAIN QUESTIONS PRESENTED BY THIS PETITION.

Whether obligatory jurisdiction may be evaded and renounced by Illinois Courts, under our constitutional system of government.

Constitution of United States, Art. VI, paragraph 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Whether the Illinois Courts by renouncing obligatory jurisdiction with which they are vested by the Constitutions, can thereby evade ruling upon the record as to constitutional matters presented to them by your petitioner, so that thereby your petitioner has been denied her property under the bill of rights.

Whether an appellate court of Illinois may make that factual determination which is decisive of vital rights of petitioner, on a record where the crucial facts have not been developed by the Circuit Court of first instance because that court refused as a matter of law to order discovery and accounting as your petitioner prayed for in chancery. (Rec. 13)

Whether after joint condemnation and special assessment proceedings have taken land of your petitioner, by providing a special assessment fund as a substitute therefor, the condemnor may assert that its personal liability at

law, is a substitute for the trust fund right in equity of your petitioner, against the will of your petitioner and without any proceedings to condemn the trust fund, and contrary to the condemnation - special assessment joint judgment, which was entered by the County Court.

STATEMENT AS TO JURISDICTION OF THE COURT.

Petitioner suggests that the conduct here by the courts of Illinois and the opinion by the Appellate Court of Illinois by refusal to give effect to her count in chancery, are contrary to the constitutional rights of petitioner as announced by this court in *Brinkerhoff-Faris Trust and Savings Bank* v. *Hill*, 281 U. S. 673, following: and *Missouri, Kansas and Texas Railway Company* v. *Elliott*, 184 U. S. 530, at 533, following.

A parallel refusal by the courts of Texas to follow the established practice and procedure in that State was reversed by this court as a denial of due process of law. *Cities Service Oil Company* v. *Dunlap*, 308 U. S. 208, at 212.

Whenever it is apparent that the State court has tried to evade the real issue presented to it by the record for its decision, this court will make an independent examination of the issues. *Craig* v. *Harney*, 331 U. S. 367, at 373; *Urie v. Thompson*, 69 S. Ct. 1018 at 1026, and 1038.

Where it is shown by the record that the court of first instance failed to make the necessary factual determination which may be decisive of vital rights, (above page 2) this court will review and direct that a proper determination shall be made to place the crucial facts in the record. *Price* v. *Johnston*, 68 S. Ct. 1049, at 1063; 334 U. S. 266 at 291.

This court will reverse whenever the courts, whose ruling is under review, have failed to follow the established procedure and practice, applicable to the record brought to this court.

Separateness of Chancery Procedure in Illinois

The separateness of chancery by complaint and procedure in Illinois as developed by legal history, is established by the Constitution of Illinois (Page 29 below) and is confirmed by § 31 of Civil Practice Act and Rules 11 and 12 made by the Supreme Court at Illinois. (Ill. Rev. Statutes Chap. 110 § 155, 259.11 and 259.12).

DEPARTURE FROM ESTABLISHED LAW.

Petitioner comes here with her record whereby the courts of Illinois by decree, and the Appellate Court of Illinois for the First District, by its opinion, make departure from the established practice and procedure of historic chancery, as disclosed by the settled decisions of Illinois and national courts prior to the time of this suit.

Those decisions by the Supreme and Appellate Courts of Illinois during many decades before this case, necessarily became an established part of the constitutional rights of your petitioner. The sudden departure by the courts of Illinois in the instant case is not a construction or interpretation of any statute or constitution, but is in fact nothing more nor less than an outright seizure by the court of power, and an arbitrary denial of Federal constitutional rights vested in your petitioner as herein stated.

By paragraph 7 of the count in chancery (Rec. 17) it is shown that respondent City of Chicago, sixteen years after judgment and eleven years after the principal of the judgment has paid to another beneficiary of the trust fund interest similar to that which your petitioner has demanded by the present suit. It is a denial of equal protection of the law and pure favoritism when the City of Chicago, recognizing the right to interest on the part of one beneficiary, refuses the equal and coordinate right of your petitioner, another beneficiary.

Statutory Basis for Certiorari

Timely application for review by this court, is made by presenting and filing the record and this petition for writ of certiorari. The petition is prepared pursuant to section 1257(3) of the new Federal Judicial Code (old code section 237b) and rule 38 of the Supreme Court as amended.

The petition and record are presented and filed in this court within ninety days after May 12, 1949 when the Supreme Court of Illinois denied our petition for leave to appeal. § 2101(c) of New Federal Judicial Code.

PRAYER FOR RELIEF.

Your petitioner submits that she did not receive due process of law or equal protection of the law in the courts of Illinois in this case. The action of the Circuit Court and Appellate Court and Supreme Court of Illinois took away her vested property rights in the trust fund, by arbitrary and capricious decision. That action is such as to call for review and reversal by the Supreme Court of the United States.

WHEREFORE, petitioner prays the allowance of a writ of certiorari to the Appellate Court of Illinois, First District, to the end that the cause herein may be reviewed and decided by this court and that the decrees and orders herein may be reversed and for such relief as this court may direct.

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SUPPORTING BRIEF FOR PETITIONER

I.

A.

The ruling and judgment of circuit court without an opinion, and the affirmance and opinion by Appellate Court of Illinois, and ruling by Supreme Court of Illinois without opinion, constitute a persistent refusal to recognize or grant any fair hearing to petitioner Cunningham upon her amended complaint in chancery filed by her April 15, 1948.

The primary duty owed by every trustee, discovery and accounting for trust fund shown by this record (Page 15 above), was refused and denied by the Illinois Courts. (Page 27 below).

Brinkerhoff-Faris Trust & Savings Bank v. *Hill*, 281 U. S. 673 ff.

Missouri, Kansas and Texas Ry. Co. v. *Elliott*, 184 U. S. 530 at 533 ff.

B.

Whenever it is apparent from the record that state courts have evaded the real issues presented by the record, this court will make an independent examination of record issues, and will give directions to enforce due process of law and equal application of law as provided by the Fourteenth Amendment to the Constitution of the United States. (Page 28 below).

Craig v. *Harney*, 331 U. S. 367 at 373.

C. B. & Q. Ry. Co. v. *City of Chicago*, 166 U.S. 226 at 241.

Urie v. *Thompson*, 69 S. Ct. 1018 at 1026 and 1038; 337 U. S. 163 at 172 and 187.

C.

A parallel refusal by the courts of Texas to follow the established practice and procedure in that state was reversed by this court as a denial of due process of law. (Page 30 below).

Cities Service Oil Company v. *Dunlap*, 308 U. S. 208 at 212.

II.

A.

As shown by her amended complaint in chancery filed April 15, 1948, in the Circuit Court of Cook County, by the joint condemnation and special assessment judgment and decree entered by defendant City of Chicago on June 9, 1926, against itself, your petitioner was endowed with the security of a trust fund for her compensation provided for by the constitution, in payment and exchange for the forcible taking of her land from her by eminent domain proceedings. (Page 34 below).

Section 42a of Local Improvement Law of Illinois and eminent domain provisions of the constitution.

B.

By current and historic chancery in Illinois established by the constitution and confirmed by statute, your petitioner is endowed with full right to have from defendant City of Chicago as trustee, a fair hearing, substantial discovery and faithful accounting of the trust fund provided as substitute for the land, as she has shown by her amended pleading. (Page 36 below).

Smith v. *Bates Machinery Co.*, 182 Ill. 166 at 168.
Hobbs v. *Monarch Ref'g. Co.*, 277 Ill. 326.
Goss-Puterbaugh Chancery (1940) § 483 at page 789 ff.
Street v. *Thompson and others*, 229 Ill. 613.
Branigar v. *Village of Riverdale*, 396 Ill. 534.
Callner v. *Greenberg*, 376 Ill. 212, at 215.

C.

Section 42a creates a fund for the express purpose of paying the full and just compensation for land condemned and taken (Pages 3, 8, 22, 38, herein).

This is a trust fund for the protection of the owner of the land taken for the improvement.

The pertinent provisions of Section 42a of the Local Improvement Act in force in 1926 and 1927 are as follows:

> "* * * So much of the aggregate amount assessed as represents the compensation for property to be taken or damaged, together with the cost of making and collecting the special assessment or special tax * * * *shall be apportioned to the first installment of the special assessment or special tax.* * * * *All installments shall bear interest until paid at the rate of six (6) per cent per annum.*" (Italics ours.)

The section requires compensation for land taken to be apportioned to the first installment. In such case payment of the award should be made out of this installment.

People v. *Smart*, 333 Ill. 135, 138.

Cohen v. *City of Chicago*, 377 Ill. 221, 230.

Where there are no installments the entire assessment is a trust fund to pay for land taken and the cost of constructing the improvement. The ordinance at bar did not divide the assessment into installments.

Special assessments pledged for specific purposes are trust funds.

Siefker v. *City of Chicago Heights*, 297 Ill. App. 113.

People ex rel. First National Bank of Stevens Point, Wisconsin v. *Village of Stickney*, 312 Ill. App. 179.

Village of Lansing v. *Sundstrom*, 379 Ill. 121.

People v. *Smart*, 333 Ill. 135.

Rothschild v. *Village of Calumet Park*, 350 Ill. 330.

Chicago Flower Growers, Inc. v. *City of Chicago*, 306 Ill. App. 571 and 316 Ill. App. 153.

Conway v. *City of Chicago*, 237 Ill. 128.

Gray v. *Town of Thermopolis*, 33 Fed. Supp. 77.

5 McQuillan Mun. Corps. (2d ed.) 426, sec. 2095.

The rebate or surplus fund provided for in section 93 of the local improvement act is an express trust fund, not an implied trust fund, for the benefit of assessees.

Flanagan v. *City of Chicago*, 311 Ill. App. 135.

Site of Fort Dearborn Building Corporation v. *City of Chicago*, 318 Ill. App. 139.

The fund created by section 42a to pay the property owner for land taken is, *a fortiori*, a trust fund for his benefit.

Restatement of the Law of Trusts, § 12 and § 219.

Reighly v. *Continental Illinois National Bank & Trust Company*, 390 Ill. 242 at 254.

Merchants National Bank of Aurora v. *Frazier*, 329 Ill. App. 191 at 201.

III.

A.

Interest on the award after delay in payment is necessary to constitute just compensation under the Illinois and U. S. Constitutions. (Page 42 below.)

Just compensation for property presently taken must necessarily mean its present value presently paid. It cannot mean its present value to be paid in the future without interest. If payment is not to accompany the taking but is to be postponed to a later date it must certainly be upon the payment of interest for the deferred period.

Mecartney v. *City of Chicago*, 273 Ill. 276, and cases therein cited.

Delay in paying the award without interest defeats the constitutional provision for just compensation.

People ex rel. Wanless v. *City of Chicago*, 378 Ill. 453, 459.

Feldman v. *City of Chicago*, 363 Ill. 247.

Illinois Constitution, Sec. 13, Art. 2.

The United States Supreme Court rule is the same.

Seaboard Air Line R. Co. v. *United States*, 261 U. S. 299.

United States v. *Creek Nation*, 295 U. S. 103.

Shoshone Tribe v. *United States*, 299 U. S. 476.

Phelps v. *United States*, 274 U. S. 341.

Jacobs v. *United States*, 290 U. S. 13.

United States Constitution, Fifth Amendment.

The landowner's right to such additional compensation rests on the constitution. The Interest act affords merely a convenient yardstick to measure the additional allowance to which he is entitled under the constitution. It is immaterial whether this allowance is called interest or additional compensation. It derives from the constitutional provision for just compensation. *Wanless, Mecartney* and *Feldman* cases, *supra.*

The Interest act does not control *the right of the owner* to further compensation. It merely measures the value of that right in terms of money.

No statute and no decision can limit or reduce the right of the owner which is created by the Constitution to receive just compensation in a court which administers due process of law and makes an equal application of law and the Constitution.

B.

The owner of land taken or damaged has an absolute right to damages whenever his property is taken or damaged for public use. This is a vested property right.

He cannot be divested of that right under the guise of a statute of limitations. Statutes of limitation affect only the remedy. They cannot impair or destroy vested constitutional rights. (Page 44 below.)

People v. *Smith*, 374 Ill. 286, 288.
Smith v. *Toman*, 368 Ill. 414, 420.
People v. *Kingery*, 369 Ill. 289.
Ettor v. *Tacoma*, 228 U. S. 148, 157.
Illinois Constitution, Sec. 13, Art. 2.

ARGUMENT FOR PETITIONER.

I.

A.

The ruling and judgment of the circuit court without an opinion, and the affirmance and opinion by Appellate Court of Illinois, and ruling by Supreme Court of Illinois without opinion, constitute a persistent refusal to recognize or grant any fair hearing to petitioner Cunningham upon her amended complaint in chancery filed by her April 15, 1948.

In the opinion of the Appellate Court of Illinois for the First District discussing the judgment brought there for review, that court baldly says:

> "Plaintiffs theory of a trust as set forth in their briefs is without merit".

A similar assertion and ruling made in a case which came up from the Kansas City Court of Appeals was met with an order for reversal after examination of the record by this court.

Missouri, Kansas and Texas Railway Company v. *Elliott*, 184 U. S. 530 at 533 ff, Law Ed. 673 at 676 1902.

Brinkerhoff-Faris Trust and Savings Bank v. *Hill*, 281 U. S. 673 ff.

That statement by the Appellate Court of Illinois, ignores and refuses to face the count in chancery which is the important part of the complaint on which your petitioner relies.

"Whether petitioner does or does not have any new information is a matter unrevealed by anything before us or before the Circuit Court of Appeals. It is a matter which should be determined in the first instance by the District Court. And it is one on which petitioner is entitled to be heard either at a hearing or through an amendment or elaboration of his pleadings. Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed. *Cf. Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, at 257."
Price v. *Johnston*, 334 U. S. 266 at 291.

That ruling applies precisely to the bald determination by the Appellate Court of Illinois "Plaintiffs theory of a trust as set forth in their briefs is without merit". This determination of fact is made without the discovery and accounting for which petitioner asked in her amended complaint and has never had any hearing. (Rec. 13-21)

B.

Whenever it is apparent from the record (Rec. 24-31) that state courts have evaded the real issues presented by the record, this court will make an independent examination of record issues, and will give directions to enforce due process of law and equal application of law as provided by the Fourteenth Amendment to the Constitution of the United States.

The affidavit for defendant is directed only against the count for debt. The affidavit is limited to payment of the principal of the award. The affidavit does not controvert the essential claim for interest in either count. The affidavit does not deny the creation nor existence of the trust set forth by the amended complaint. The affidavit does not suggest any defense to claim for discovery and for account-

ing in equity. The complete failure to deny is an admission that the trust was created, that it exists, that the defendant remains as trustee, and that plaintiff is a beneficiary of that trust so far as accrued interest is part of just compensation.

By Article VI Section 12 of the Constitution of Illinois ("The circuit courts shall have original jurisdiction of all causes in law and equity") and by section 1 of chapter 22 of Illinois Statutes ("according to the general usage and practice of courts of equity") the trial court in this case is vested with historic powers and duties that pertain to the High Court of Chancery. By the current and historic chancery practice and procedure, the court is always open by original jurisdiction to order full discovery and accounting as to any fund from which plaintiff is to be paid.

Street v. *Thompson and others*, 229 Ill. 613.
Branigar v. *Village of Riverdale*, 396 Ill. 534.

The power and duty of a court of chancery to order discovery and accounting is often used in local improvement cases where claim is made by bond owner creditors against special assessment funds.

Chicago Flower Growers, Inc. v. *City of Chicago*, 306 Ill. App. 571.
O'Laughlin Company v. *Village of Stickney*, 291 Ill. App. 606.
Cook v. *City of Staunton*, 295 Ill. App. 111.

The refusal by the trial and review courts in this case to sustain the claim made in equity by the amended complaint, and failure to order full discovery and accounting, is a denial of the usual and due process of law and equal application of law which, as shown above, is the established practice and procedure in the State of Illinois, and commonly applied to other litigants. The refusal to apply that

practice and procedure against the city of Chicago in this case is arbitrary discrimination, and refusal to open the door of justice at all for this plaintiff.

A like ruling which met with reversal by this court was made in a case which came from the Kansas City Court of Appeals in Missouri.

> *Missouri, Kansas and Texas Railway Company* v. *Elliott*, 184 U. S. 530 at 533 ff. Law Ed. 673 at 676.

In the case at bar the court baldly says:

> "Plaintiffs' theory of a trust as set forth in their briefs is without merit".

That statement ignores and refuses to face the count in chancery which is the important part of the complaint on which plaintiff relies.

Whenever it is apparent that the State court sought to evade the real issues presented to it for decision, this court will make an independent examination of the issues and the facts.

> *Craig* v. *Harney*, 331 U. S. 367 at 373.
>
> *Chicago, Burlington & Quincy Railroad Company* v. *City of Chicago* 166 U. S. 226 at 241.

C.

A parallel refusal of the Courts of Texas to follow the established practice and procedure in that state was reversed.

> *Cities Service Oil Company* v. *Dunlap*, 308 U. S. 208 at 212 (1939).

The Supreme Court there said:

> "We cannot accept the view that the question presented was only one of practice in courts of equity. Rather we think it relates to a substantial right upon which the holder of recorded legal title * * * may confidently rely."

By this petition we seek such an independent examination of the case made for petitioner by the record in the trial court.

Urie v. *Thompson*, 69 S. Ct. 1018 at 1026 and 1038.

The trust fund is security and substitute for the land taken by the condemnation proceeding. It is a personal property right. That right can be disposed of only under the law of trusts. It is not claimed by the city of Chicago that this trust has ever been repudiated. Until that has been done there cannot be any application of any statute of limitations.

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in due process of law required by the 14th Amendment of the Constitution to the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner of that instrument."

C. B. & Q. R.R. v. *City of Chicago*, 166 U. S. 226, at 241.

The statement by respondents in this Court, and before the State Courts, is one of confession. They admit the correctness and truth of our complaint and our petition. In this Court and in the State Courts, they have sought an avoidance by ignoring the nature and effect of the pleadings in the record and by contending the Courts must decide in favor of respondents, without any regard for the language of the pleadings in equity and the petition here by the plaintiffs.

Restatement of the Law of Trusts, ¶91, 12, 198, 199, 219.

Respondents Wish to Denature This Equity Suit.

The plaintiffs raised constitutional issues by the complaint in chancery in the trial court, and reasserted the same, by all the briefs that were filed in each of the Illinois Courts, and by our petition now before this Court. The City of Chicago and the Courts of Illinois deny to us due process of law and equal protection of law, by their words of bold assertion which seek to denature our suit from being one in chancery into becoming exclusively a suit at law, basically different in its nature.

Petitioner has shown by this record that she did *not* receive any day in Court, *on the case in chancery made by her pleadings.* Under Illinois Laws and its Constitution, petitioner was entitled to a hearing upon her property rights in equity before the Courts of Illinois, upon her pleadings in chancery. This right has been ignored and refused, by the action of those Courts, as we have shown by the record.

This Court has many times stopped the destruction of citizen rights, attempted by one or another form of either direct or indirect evasion. In the case at bar, we have shown an attempt to destroy our property rights by circumvention. Respondent persuaded the courts of Illinois to suppose and to decide a case at law, whereas the facts set forth by the complaint establish a case of historic chancery, which is entitled to claim and to receive from this court, the protection of the Fourteenth Amendment to the Constitution of the United States.

The respondent and the Courts of Illinois in the case at bar would erase entirely so far as petitioner is concerned, both the right and procedure of chancery or equity.

They Advocate Judicial Repeal of the Constitution.

The right of petitioner is not merely procedural. It is also a substantive right of property under the Constitution.

Potter v. *Couch*, 141 U. S. 296 at 320.

Illinois courts in *Maloney* v. *City of Des Plaines*, 303 Ill. App. 233; *Markman* v. *Calumet City*, 297 Ill. App. 531; *Bankers Life Company* v. *Chicago Park District*, 318 Ill. App. 214; *Roberts* v. *Village of Lyons*, 307 Ill. App. 36, and many other cases, have ruled that statutes of limitation in these special assessment matters cannot be applied until after the municipality has definitely shown that it has funds available and offers payment. The contrary fact of refusal to make payment, is established by this record. The City of Chicago does not so proceed. It merely asserts there is some statute of limitation. Defendant fails to specify any statute. The facts are not shown by the defense and do not exist, which are necessary to start the running of any Statute of Limitation. *White* v. *Sherman*, 168 Ill. 589 at 605. Notice of disclaimer and repudiation of trust are indispensable to start running of time for limitation.

The foregoing Federal questions are of such general public importance, and are particularly of such grave personal importance to your petitioner, that they should be reviewed by this Court. Particularly is that so because the rulings made by the courts of Illinois on this record seem to be in clear conflict with decisions and rulings previously made by this Court. (See above pages 27ff.)

The equal protection of laws is a pledge of protection of equal law.

State of Missouri ex rel Gaines v. *Canada*, 305 U. S. 337 at 350.

The primary duty is obligatory upon all courts, both state and national, to hear and determine constitutional

questions and federal questions, which are presented by the record.

Article VI of the Constitution of the United States (Second Paragraph).

Conway v. *Cable*, 37 Ill. 82 at 90.

West Chicago Street Railway Co. v. *Illinois ex rel. Chicago*, 201 U. S. 506 at 519-520.

Coombes v. *Getz*, 285 U. S. 434.

II.

A.

As shown by her amended complaint in chancery filed April 15, 1948, in the Circuit Court of Cook County, by the joint condemnation and special assessment judgment and decree entered by defendant City of Chicago on June 9, 1926, against itself, your petitioner was endowed with the security of a trust fund for her compensation provided for by the constitution, in payment and exchange for the forcible taking of her land from her by eminent domain proceedings.

The separateness of Chancery by complaint and procedure in Illinois as developed by legal history, is established by the Constitution of Illinois (page 29 above) and is confirmed by § 31 of Illinois Civil Practice Act and by Rules 11 and 12 made by the Supreme Court of Illinois (Ill. Rev. Statutes, Chap. 110; §§ 155, 259.11 and 259.12).

Defendant City of Chicago by entering final judgment confirming the assessment roll on June 9, 1926, (Rec. 15) which assessed the City of Chicago $228,766.38 for that improvement, made itself at that date trustee of that sum as part of the trust fund for payment to plaintiff as one owner of real estate taken by that condemnation proceeding (Exhibit A to amended complaint, Rec. 21); and undertook to collect the balance of the assessment viz., the sum of $215,593.62, which was assessed against others than the City of Chicago. The right, power and duty of City of Chicago as such trustee so to do, are shown and established

by the amended complaint in equity (Rec. 16ff). The defendant made no denial whatever of the foregoing.

On the contrary, the affidavit for defendant (Rec. 24-31) shows affirmatively that only the principal of the award was paid and

> "The defendant, City of Chicago, has neither made any payments on account of interest or made any promises to pay any interest on said condemnation award or judgment since the date of payment of said award." (Rec. 25)

The contention by the city as stated by the Appellate Court in the case of *Boal* v. *City of Chicago,* 330 Ill. App. 614 is

> "that plaintiff is neither a holder of bonds issued in anticipation of collections of special assessments nor an assessee who claims a surplus in certain funds over and above the cost of completing local improvements; that no case can be found in this State holding that the municipality stands in a trust relationship to a judgment creditor, who is not limited to any particular fund nor limited to a distributive share in any fund; that the judgment in the instant case, if the claim is not barred by the statute, is an absolute liability of the municipality payable in full and at all events; that the city's resistance to plaintiff's claim is not on the basis that there is not sufficient money in some fund with which to pay the claim for which reason the claim falls; that the defense is that the claim for interest is barred by the statute of limitations; that if it is not barred the full taxing power of the city should be called upon to accomplish payment of the claim."

That contention is that if a trustee is also liable personally, a claimant must pursue the personal liability or he loses his claim against the trust fund. That simply never was the law anywhere. No claimant is compellable by the holder of two funds to say which the claimant will pursue. (*Boone* v. *Clark,* 129 Ill. 466 at 480) Only an adverse claimant to one of the funds may do that. The defense of waiving a claim against one of the funds, cannot possibly be applicable to the right of payment from the

remaining trust fund. Especially where as here the fundamental constitutional law of eminent domain requires that fund as a substitute for property taken by force from the citizen. To say as the city does that an assessee may recover from the trust fund, and that a bondholder may recover from the trust fund, but that the owner who loses his real estate by forcible condemnation may not do so, would defeat the fundamental nature of constitutional protection for property, which is shown by this petition.

B.

By current and historic chancery established by the constitution and confirmed by statute, your petitioner is endowed with full right to have from defendant City of Chicago as trustee, fair hearing, substantial discovery and faithful accounting for the trust fund provided as substitute for the land, as she has shown by her amended pleading in chancery. (§ 31 of Civil Practice Act).

In *Pease* v. *Kendall,* 391 Ill. 193 at 197 the Court ruled:

> "Courts of equity have paramount jurisdiction in the settlement of trust estates and may even control courts of law in their action in that regard. *Grattan* v. *Grattan,* 18 Ill. 167, 65 Am. Dec. 726; 1 Story's Eq. Juris, chap. 9; Williams on Executors, pp. 1239 and 1240. It is evident from the pleadings that a dispute had arisen as to who is entitled to the property belonging to the estates of John H. and Edwin A. Pease. It is also clear from the facts shown that a necessity existed to safeguard and preserve the assets of the estate of John H. Pease and prevent waste until his will and that of his son could be construed. A court of equity has paramount jurisdiction in such a situation. *Curtiss* v. *Brown,* 29 Ill. 201."

See above pages 18 and 34. *Cummings* v. *Smith,* 368 Ill. 94 at 104ff. reaches the same conclusion that *equity jurisdiction is paramount over the law action.*

Section 48 of the Civil Practice Act of Illinois (Ch. 110, par. 172) provides for involuntary dismissal for certain

defects of complaint. That section of the statute reads in part as follows:

> "Defendant may, within the time for pleading, file a motion to dismiss the action or suit, where any of the following defects appear on the face of the complaint, *and he may within the same time, file a similar motion supported by affidavits* where any of the said following defects exist but do not appear upon the face of the complaint."

Affidavit for City of Chicago

The affidavit for defendant in the suit at bar does not purport to cover or support points 2 to 8 inclusive of defendant's motion. Those points relate to Count II of the complaint in chancery. The affidavit makes no reference or statement as to any matter of trust fund or trust estate, other than to admit that the principal of the award was paid out of the assessment trust fund. Consequently the affidavit for defendant does not support points 2 to 8 inclusive of the motion for defendant, and those points are void and invalid because not supported by affidavit as the statute provides. Furthermore the affidavit to the amended complaint by the plaintiff (Rec. 20) is full, complete and positive support to the amended complaint and trust fund. Under these circumstances no defense whatever is made against the amended complaint. Thereby plaintiff is entitled to her judgment on the face of the record. (Rec. 22)

No denial is made of the condemnation-assessment roll joint judgment on June 9, 1926, (Rec. 15). Defendant admits payment out of that special assessment warrant (Rec. 17 and 26 to 29). This suit seeks enforcement of that judgment to the extent of interest accruing thereon from that date to the dates when the principal award was paid to the plaintiff. The defendant resists payment of that accrual of just compensation.

The only purpose of having courts and making judgment is to have the order of the court enforced. Recently

the Supreme Court of Illinois enforced a judgment obtained against a citizen of Illinois on service of notice from Daviess County, Indiana. *McCallum* v. *Baltimore and Ohio Railroad Company,* 379 Ill. 60. Which is all the more reason why Illinois courts should enforce performance of the trust res special assessment fund established by the judgment of June 9, 1926. The defendant makes no claim to any dissolution or termination of that trust fund.

C.

Section 42a of the Local Improvement Act creates a fund for the express purpose of paying full and just compensation. This is a trust fund for the protection of the owner of the land taken for the improvement and the Statute of Limitations is not applicable to such a fund.

The section provides a new and distinct mode of financing the cost of a local improvement where the ordinance combines construction and the acquisition of land necessary therefor.

The section finances both land and construction costs out of the special assessment provided for in the section. In this respect it is unique. There is no other section in the Local Improvement Act like it. The legislature intended the assessment to be a trust fund to pay for land taken and the cost of construction.

The section also provides for the collection of interest on all installments, and this interest is a part of the trust fund.

The controlling decision of *People* v. *Smart,* 333 Ill. 135 (1928) construes and interprets section 42a. This case has never been modified or overruled.

In the *Smart* case, this Court held, at page 137:

> "While Section 42a gives to municipalities in a combined proceeding for the construction of an improvement and the taking of property therefor, the

power to spread the cost of construction in ten installments, it specifically requires the compensation for property taken to be apportioned to the first installment, thus providing a fund available for the purpose of paying compensation for property taken within thirty days after the entry of order of confirmation, at which time the first installment becomes due and payable. *The fund for the payment of compensation having been thus provided for by the first installment, it would seem logical to follow that payment of awards of property should be made out of this fund.*" (Italics ours.)

This ruling that the proceeds collected on the first installment constitute a special fund for the benefit of the owner of the property taken was repeated, approved and the principle followed by the Supreme Court in *Cohen* v. *City of Chicago,* 377 Ill. 221, at pages 230-231.

The *Smart* case was repeatedly called to the attention of the Appellate Court in the *Boal* case and in the instant case. No reason was assigned in the opinion in either case for ignoring the Smart holding.

We quote from *Town of Cicero* v. *Green,* 211 Ill. 241, at 246:

"Appellees also contend that the interest on the contractor's vouchers, amounting to $9,045.80, cannot be considered part of the cost of the improvement, and that there is no deficiency unless it is based upon that item. The stipulation was that the entire amount of the original assessment was collected, and that it amounted to $56,122.83. Section 55 of the act provided for dividing the assessment into installments, the first of which should not exceed 25 per cent of the assessment, and the remaining portion to be divided into four equal installments, bearing interest at the rate of 6 per cent per annum. 1 Starr & C. Ann. St. p. 781. Section 63 provided that the vouchers should bear the same rate of interest as the installments, and it was intended that the interest on the installments and the interest on the vouchers should equal each other. The total amount

collected, according to the stipulation, necessarily included the interest, and, *where payments are deferred, the interest is as much a part of the cost of the improvement as the principal.* The contractor is as much entitled to the interest on the voucher as he is to the principal. *People* v. *City of Chicago,* 152 Ill. 546. *In case of a partial payment upon an interest-bearing obligation exceeding the interest, the payment is first applied to satisfy the interest due, and the balance on the principal. The cost of the improvement is the total amount paid for it, and whatever remains unpaid is a deficiency.*" (Italics ours.)

This statement of law as to *inclusion of interest as part of the fund which is security* for a contractor who takes bonds as payment for his work upon a public improvement, is all the more true as to an owner whose real estate is taken from him by court in condemnation proceedings. The present suit seeks a like accounting and an equal security and payment of judgment entered as compensation for real property taken for a public improvement. Due process and just compensation so require under State and National Constitutions, as set forth throughout this record.

In its opinion in the instant case the Appellate Court considered as controlling its decision in the *Boal* case (330 Ill. App. 614). In that case the court referred to *Trust Co. of Chicago* v. *City of Chicago,* 327 Ill. App. 222 and by that plaintiff, plaintiff's mention *arguendo,* of section 42a in its "Supplemental Citations and Suggestions" filed therein. The court's opinion in the *Trust Co.* case did not refer to section 42a, nor did the appellee city mention or argue the section either in the Appellate Court or in responding to the Trust Company's petition for leave to appeal to the Supreme Court of Illinois (denied, 391 Ill. 629).

The facts are that the *Trust Company* case was not brought under Section 42a, as is the instant case, and that in the *Boal* case the Supreme Court of Illinois was pre-

cluded from passing on appellant's contentions regarding the section because the required jurisdictional amount for a petition for leave to appeal to that court was lacking and the Appellate Court denied a petition for the issuance of a certificate of importance to the Supreme Court of Illinois.

It appears that the city is unwilling to meet the issues raised by petitioner. This may be due in part to the fact that in the instant case the city paid interest on the condemnation judgment to petitioner's sole co-defendant in the condemnation proceedings *more than fifteen years after the entry of the judgment* (Abst. 17; Rec. 23), and more than eleven years after payment of the face of the judgment.

In *Site of Ft. Dearborn Bldg. Corp.* v. *City of Chicago,* 318 Ill. App. 139, the same principle here involved was presented. In the *Ft. Dearborn* case, an assessed landowner claimed his rightful share of a surplus over and above the cost of the improvement remaining in the special assessment fund. The City of Chicago contended as in the present case, and among other grounds, that the claim was barred by the statute of limitations. The court held, however, that these local improvement funds were trust funds, and therefore the statute did not apply (318 Ill. App. 144), following the prior express ruling of the court in *Flanagan* v. *City of Chicago,* 311 Ill. App. 135, at page 155. The holding in the *Flanagan* case was likewise expressly based upon the uniform and repeated rulings of the Supreme Court in *Conway* v. *City of Chicago,* 237 Ill. 128, and *Rothschild* v. *Village of Calumet Park,* 350 Ill. 330.

A fortiori, the owner of land condemned and taken by the city is the primary beneficiary of the special assessment trust fund created to finance the improvement, and the statute of limitations cannot bar his recovery of full and just compensation.

III.

A.

Interest on the award after delay in payment is necessary to constitute just compensation under the Illinois and U. S. Constitutions.

Delay in payment of the condemnation judgment without interest is a denial of just compensation to the property owner and is contrary to the provisions of both the Federal and the Illinois Constitutions.

Illinois Constitution of 1870, Art. II, Sec. 13.

United States Constitution, Fourteenth Amendment.

The owner of property taken or damaged is also given a constitutional lien for the payment of just compensation.

Epling v. *Dickson,* 170 Ill. 329, 333.

Illinois Constitution of 1870, Art. II, Sec. 13.

A lien based on the constitution cannot be impaired or destroyed by the legislature.

The *Mecartney* case, 273 Ill. 276, the *Feldman* case, 363 Ill. 247, and the *Wanless* case, 378 Ill. 453, hold squarely that the award fixed by the judgment is not just compensation where only the face amount of the judgment is paid at a later date without interest.

In the *Mecartney* case, this court ruled that; (273 Ill. 276, at p. 281)

> " 'Just compensation for property presently taken must necessarily mean its present value *presently paid. It cannot mean its present value to be paid two years in the future without interest. If payment is not to accompany the taking but is to be postponed to a later period it must certainly be upon the payment of interest for the deferred period.*" (Italics ours.)

The same rule was restated in *Feldman* v. *City of Chicago,* 363 Ill. 247, where the Supreme Court held: (p. 253)

> "Where there is delay in the payment of a condemnation judgment it cannot reasonably be said that its payment at some later date will amount to just compensation, because the owner in such cases is deprived of the full and beneficial use and enjoyment of his property without legal process or compensation. * * * *the constitutional right of one deprived of the full use of his property to receive full compensation therefor and interest during the period of time this compensation is withheld*—is well settled in almost all of the States." (Italics ours.)

In *People ex rel. Wanless* v. *City of Chicago,* 378 Ill. 453, at pp. 458-59, the Supreme Court again restated and reaffirmed this well settled constitutional ruling.

Not only the Illinois Constitution, but also the United States Constitution has uniformly been held to vest in the property owner the constitutional right to interest upon the condemnation award during the period it is withheld, as an essential element of "just compensation." Thus in *Seaboard Air Line R. Co.* v. *United States,* 261 U. S. 299 (1922), the United States Supreme Court stated: (p. 306)

> "The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

This federal rule, under the Fifth Amendment to the United States Constitution is well settled and long established. (*U. S.* v. *Creek Nation,* 295 U. S. 103; *Shoshone Tribe* v. *U. S.,* 299 U. S. 476; *Phelps* v. *U. S.,* 274 U. S. 341; *Jacobs* v. *U. S.,* 290 U. S. 13.)

B.

The owner of land taken or damaged for public use has an absolute right of compensation therefor. This is a vested, constitutional property right and cannot be divested under the guise of a Statute of Limitations.

The owner of land taken has a vested property right in the compensation awarded for property taken or damaged for a public improvement.

People v. *Smith*, 374 Ill. 286.
Ettor v. *Tacoma*, 228 U. S. 148.

In the *Smith* case (374 Ill. 286) the Illinois Supreme Court stated (p. 288):

> "Section 13 of Article 2 of the Illinois Constitution makes absolute the right of a landowner to damages when his property is taken or damaged for public use. It makes no difference whether the damages are ascertained before or after the injury is inflicted. (*People* v. *Kingery*, *supra*, (369 Ill. 289), at page 293). This is a vested property right. *Ettor* v. *Tacoma*, 228 U. S. 148, 157, 57 L. ed. 773, 779." (Italics ours.)

In *Ettor* v. *Tacoma*, 228 U. S. 148, the United States Supreme Court likewise held that the right of the landowners whose property is taken or damaged to compensation is a vested property right. The Court held further that this vested right was fully protected, under the Fourteenth Amendment to the U. S. Constitution, from destruction by a repeal of the compensatory provision after the damage is done.

It is thus clear that the constitutional right of appellant in the present case to all the essential elements of "just compensation," including interest on the award during the period its payment is withheld, is a vested property right which cannot be divested by invoking the provisions of a

mere procedural and remedial statute, as that of limitations.

Statutes of limitations affect only the remedy. They cannot destroy substantive rights. *People* v. *Smith*, 374 Ill. 286, 288; *Smith* v. *Toman*, 368 Ill. 414. Restatement of the Law of Trusts, §§ 12 and 219.

Furthermore without regard to mere procedural requirements, this suit is brought as a cause of action for the enforcement of a trust duty and obligation, voluntarily undertaken and assumed and carried on by the City of Chicago. Against such trust obligation in equity, there exists in Illinois, no statute of limitations. *C. & E. I. Ry. Co.* v. *Hay*, 119 Ill. 493 at 502.

Appellant is entitled to recover both on the theory of a trust fund and on the ground that she has a vested property right in just compensation which requires an additional allowance where there has been a year and a half's delay, as in this case, in payment of the judgment.

Call it what you will, interest or additional compensation, she has not received full compensation for her property. To deny the allowance of interest or its equivalent is to deny full and just compensation to the property owner contrary to the provisions of the Illinois constitution which prohibits the taking of private property for public use without just compensation.

The *Turk* case, 352 Ill. 171, held that the Interest Act embraces a condemnation judgment which is essentially a *quod recuperet* judgment. That is sound doctrine but it does not exclude the rule announced by Mr. Justice Cartwright in the *Mecartney* case. In later cases emphasis was shifted by the court to the Interest act as a source of additional compensation after delay in payment of the judgment. In doing that the constitution, as the real basis for an additional allowance, was disregarded by the Illinois Courts in suits brought at law.

CONCLUSION FOR RELIEF.

The fundamental and basic constitutional rule, however, is that laid down by the Illinois Court in the *Mecartney* (273 Ill. 276), *Feldman* (363 Ill. 247) and *Wanless* (378 Ill. 453), cases, namely, that delay in the payment of a condemnation judgment, without interest, defeats the constitutional provision for just compensation.

No procedural or remedial statute, such as the statute of limitations, can divest the property owner's right to receive such full and just compensation. No statute for such a purpose ever existed in Illinois.

The general law is that a trust is free from time limitations, and must be administered by a court of chancery, when the beneficiary seeks relief. That is also the law of Illinois.

> Restatement of the Law of Trusts, §§ 125, 198, 199, 219.

Your petitioner submits that she did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court, Appellate Court and Supreme Court of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

Wherefore, petitioner prays for the allowance of your writ of certiorari to the Appellate Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein may be reversed, and for such relief as this Court may direct.

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